

THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

COALVIEW CENTRALIA, LLC,  
a Delaware limited liability company,

Plaintiff,

v.

TRANSALTA CENTRALIA MINING LLC,  
a Washington limited liability company, and  
TRANSALTA CORPORATION, a Canadian  
corporation,

Defendants.

NO. 3:18-cv-05639

PLAINTIFF'S ALTERNATIVE RULE  
56(d) MOTION REGARDING  
DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR:

NOVEMBER 1, 2019<sup>1</sup>

Plaintiff, COALVIEW CENTRALIA, LLC (“Coalview”), through undersigned counsel, and pursuant to Fed. R. Civ. 56(d), hereby files this Alternative Rule 56(d) Motion Regarding Defendant, TRANSALTA CENTRALIA MINING LLC’s (“TCM”), Motion for Partial Summary Judgment Regarding Termination (D.E. 179, the “MSJ”).<sup>2</sup>

<sup>1</sup> However, Coalview respectfully requests that the Court take this motion into consideration when ruling upon TCM’s Motion for Summary Judgment, which is set for hearing on October 16, 2019. D.E. 212 (Notice of Rescheduled Hearing).

<sup>2</sup> TCM’s MSJ was filed under seal.

## **INTRODUCTION**

While, as set forth in detail in Coalview's Opposition (D.E. 202) to the MSJ, Coalview maintains that TCM's MSJ should be denied on the merits due to the existence of a multitude of genuine issues of material fact, as well as TCM's inconsistent representations made to this Court vis-à-vis to the government; however, in the alternative, Coalview files this motion requesting that, if the Court is not inclined to deny the MSJ on any of those bases, it should deny, or defer ruling on, the MSJ pursuant to Rule 56(d). While Coalview made a request, in the alternative, under Rule 56(d) in its Opposition to the MSJ, D.E. 202, n.33, Coalview files this motion in light of the Court's recent order requiring TCM to produce documents responsive to its Second Request for Production by October 12, 2019 (D.E. 213, Order Granting Motion to Compel), TCM's motion filed on October 10, 2019 seeking relief from that Court-ordered deadline (D.E. 216), and to provide the Court with additional information regarding Coalview's need for additional discovery prior to any adverse ruling on the matters at issue in TCM's MSJ.

## **ARGUMENT AND AUTHORITIES**

### **I. Rule 56(d) Standard**

Federal Rule of Civil Procedure 56(d) provides that:

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d). Rule 56(d) "provides a device for litigants to avoid summary judgment when they have not had sufficient time to develop affirmative evidence." *Tarutis v. Wal-Mart*

1 *Stores, Inc.*, No. C12-5076-RJB, 2013 WL 247710, \*2 (W.D. Wash. Jan. 23, 2013) (denying  
 2 motion for summary judgment without prejudice under Rule 56(d)). “The primary purpose  
 3 of Rule 56(d) is to ensure that parties have a reasonable opportunity to prepare their case and to  
 4 ensure against a premature grant of summary judgment.” *Id.* A Rule 56(d) “continuance of  
 5 a motion for summary judgment for purposes of conducting discovery should be granted almost  
 6 as a matter of course unless the non-moving party has not diligently pursued discovery of  
 7 evidence.” *Id.* (citing *Burlington N. Santa Fe R.R. v. The Assiniboine & Sioux Tribes of the Ft.*  
 8 *Peck Reservation*, 323 F.3d 767, 773-74 (9th Cir. 2003)).

10 “The cases construing Rule 56(f) suggest that the denial of a Rule 56(f) application is  
 11 generally disfavored where the party opposing summary judgment makes (a) a timely  
 12 application which (b) specifically identifies (c) relevant information, (d) where there is some  
 13 basis for believing that the information sought actually exists. Summary denial is especially  
 14 inappropriate where the material sought is also the subject of outstanding discovery requests.”  
 15 *VISA Intern. Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir. 1986)  
 16 (reversing summary judgment and finding abuse of discretion where district court denied prior  
 17 and substantially similar rule Rule 56(f) motion); *see also Metabolife Int'l v. Womick*, 264 F.3d  
 18 832, 846 (9th Cir. 2001) (“Although Rule [56(d)] facially gives judges the discretion to  
 19 disallow discovery when the non-moving party cannot yet submit evidence supporting its  
 20 opposition, the Supreme Court has restated the rule as requiring, rather than merely permitting,  
 21 discovery ‘where the non-moving party has not had the opportunity to discover information  
 22 that is essential to its opposition’”) (*quoting Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 250  
 23 n.5, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986)). Moreover, a Rule 56(d) “request [is] timely if  
 24  
 25  
 26

made prior to the summary judgment hearing.” *IVC Highlands TT, LLC v. DirectBuy, Inc.*, C16-327RAJ, 2016 WL 3690127, at \*2 (W.D. Wash. July 12, 2016) (granting Rule 56(d) motion and denying motion for summary judgment without prejudice) (citing *Ashton-Tate Corp. v. Ross*, 916 F.2d 516, 520 (9th Cir. 1990)). Here, Coalview easily satisfies the Rule 56(d) standard.

## II. The Court Should Deny TCM’s Motion for Summary Judgment or Defer Consideration So That Relevant Discovery Can Occur.

TCM’s MSJ seeks an order finding that TCM’s attempted termination of the parties’ Master Services Agreement based on Coalview’s purported (and disputed) insolvency was valid, and “dismissing [Coalview’s] force-majeure defense.” D.E. 179 (TCM’s MSJ) at 24. On June 14, 2019, Coalview served its Second Request for Production, seeking four specific categories of documents indisputably relevant to the matters at issue in TCM’s MSJ, simplified as follows: (1) TCM’s efforts to repudiate or exit the parties’ agreements (Requests 1-5); (2) Coalview’s force majeure assertion (relating to the December 2018 dredging incident and subsequent government investigation and K Order) (Requests 6-9); (3) TCM’s claim that Coalview is insolvent (Request 10); and (4) Documents supporting TCM’s allegations in its Amended Counterclaim (Requests 11-29). *See* Declaration of Steve I. Silverman (“**Silverman Dec.**”), filed contemporaneously hereto, ¶4. In response, TCM raised a host of baseless objections to these indisputably relevant requests, and refused to produce any responsive documents. *Id.*, ¶5. Accordingly, Coalview was forced to file a Motion to Compel (D.E. 197). *Id.*, ¶6. On October 2, 2019, the Court granted Coalview’s Motion to Compel, ordering TCM to produce all non-privileged documents responsive to Coalview’s Second Request for Production within ten days. D.E. 213 at 1. *Id.*, ¶7. To date, TCM has not produced any additional

documents pursuant to the October 2, 2019 Order. *Id.*, ¶8. Moreover, TCM seeks to further delay production of these relevant documents by filing, on October 10, 2019, a Motion for Relief from the Court-ordered deadline, D.E. 216, which motion, in reality, is a veiled motion for reconsideration of the Order granting Coalview’s Motion to Compel. Thus, TCM refuses to produce prior to the October 16 hearing the documents that the Court ordered TCM to produce prior to the hearing, creating further reason to grant Coalview’s Rule 56(d) request.

Additionally, as set forth in Coalview’s Opposition to the MSJ, on December 29, 2019, MSHA issued a control order (Section 103(k) of the Mine Safety and Health Act of 1977) (the “**K Order**”), prohibiting all mining and related activity at Pond 3C until further order from MSHA. D.E. 200 (Declaration of Roger Fish in Opposition to TCM’s MSJ and in Support of Coalview’s Second Injunction Motion) (“**Fish Dec.**”), ¶13. As a result of the K Order, Coalview was unable to operate for months, and Coalview was prohibited from access to the site in order to perform its own investigation of the incident. *Id.* Now that the K Order has recently been lifted, Coalview is able to thoroughly investigate the underlying incident. *Id.*, ¶20.<sup>3</sup> Moreover, MSHA only recently concluded its investigation and published its findings online on or about September 4, 2019, listing approximately 46 people involved in the investigation, 7 of which were TCM employees, and 11 of which were MSHA employees. Silverman Dec., ¶9. Coalview disagrees vehemently with MSHA’s findings relating to the underlying incident, and anticipates that its investigation will provide further evidence to rebut MSHA’s findings and further demonstrate that the force majeure was not reasonably within

---

<sup>3</sup> In its Reply in support of its MSJ, TCM states that “Coalview has had nine months to come up with any evidence that the dredge sank for some reason other than those identified in the MSHA report.” D.E. 203 at 14. However, for the reasons set forth herein regarding the K Order prohibiting Coalview from accessing the site, the claim by TCM is without any merit.

1 Coalview's control and not the fault of Coalview. Fish Dec., ¶20. Moreover, to date, Coalview  
 2 has not had an opportunity to notice for deposition or subpoena any of the non-Coalview  
 3 employees identified in MSHA's report. Silverman Dec., ¶10.

4 Furthermore, counsel for the parties have been working together with the intention of  
 5 soon submitting to the Court a stipulated motion seeking to continue the trial date, with a  
 6 proposed continued trial date in early to mid 2020. Silverman Dec., ¶11. Due to TCM's delays  
 7 and failures to produce documents responsive to Coalview's discovery requests, as well as the  
 8 parties' intending to seek a continuance of the trial, to date, no depositions have been taken by  
 9 either party, including regarding the merits of TCM's MSJ. Silverman Dec., ¶12.

11 Accordingly, TCM has moved for summary judgment before Coalview has been  
 12 permitted an opportunity to conduct sufficient discovery regarding the matters at issue in  
 13 TCM's MSJ. Without the discovery set forth herein, Coalview cannot present facts essential to  
 14 justify its opposition to the MSJ, including, without limitation, with respect to force majeure  
 15 and solvency. These are critical issues in this case for which Coalview should be permitted  
 16 discovery (and for which the Court has ordered discovery from TCM) prior to any adverse  
 17 judgment being entered in TCM's favor on its MSJ (although, again, Coalview maintains that  
 18 the MSJ should be denied on the merits on the present record).<sup>4</sup> As demonstrated above, this is  
 19 not an instance where Coalview is guilty of any delay. Accordingly, Coalview respectfully  
 20 requests that, if the Court is not inclined to deny TCM's MSJ on the merits for the reasons set  
 21 forth in its Opposition to the MSJ, that, alternatively, the MSJ be denied or held in abeyance, at  
 22 least until Coalview is able to conduct sufficient discovery regarding the matters at issue  
 23  
 24

25 <sup>4</sup> Conversely, Coalview's Motion for Summary Judgment (D.E. 157) presents a purely legal issue regarding the  
 26 interpretation of the parties' contracts, for which no additional discovery is needed (nor requested by TCM).

1 therein, including, without limitation, obtaining the documents ordered to be produced by the  
 2 Court in its October 2, 2019 Order (which TCM has now further delayed), and subpoenaing  
 3 and/or taking the deposition of various witnesses involved in MHSA's investigation or who  
 4 otherwise have knowledge regarding the matters set forth in TCM's MSJ, including force  
 5 majeure and solvency.<sup>5</sup>

7 WHEREFORE, for the foregoing reasons, Coalview, in the alternative to requesting that  
 8 the Court deny TCM's MSJ on the merits, respectfully requests that the Court deny or defer  
 9 ruling on TCM's MSJ pursuant to Rule 56(d) and grant such other and further relief for  
 10 Coalview as this Court deems just and appropriate.

11 DATED this 11<sup>th</sup> day of October 2019.

12 KLUGER, KAPLAN, SILVERMAN,  
 13 KATZEN & LEVINE, P.L.

14 By s/Steve I. Silverman  
 15 Steve I. Silverman, Fla. Bar No. 516831  
 16 Philippe Lieberman, Fla. Bar No. 27146  
 17 Miami Center, 27th Floor  
 18 201 South Biscayne Boulevard  
 19 Miami, FL 33131  
 20 Telephone: (305) 379-9000  
 21 Fax: (305) 379-3428  
 22 Email: [ssilverman@klugerkaplan.com](mailto:ssilverman@klugerkaplan.com)  
 23 Email: [plieberman@klugerkaplan.com](mailto:plieberman@klugerkaplan.com)  
 24 Attorneys for Plaintiff  
 25 (Admitted Pro Hac Vice)

26 <sup>5</sup> Indeed, to date, Coalview has not had an opportunity to take the deposition of TCM's expert witness, Lorraine Barrick, whom TCM relies upon extensively in its MSJ.

GARVEY SCHUBERT BARER, P.C.

By s/David R. West

David R. West, WSBA #13680

By s/Daniel J. Vecchio

Daniel J. Vecchio, WSBA #44632

1191 Second Avenue, 18th Floor

Seattle, WA 98101

Telephone: (206) 464-3939

Fax: (206) 464-0125

Email: [drwest@gsblaw.com](mailto:drwest@gsblaw.com)

Email: [dvecchio@gsblaw.com](mailto:dvecchio@gsblaw.com)

*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I hereby certify that on October 11, 2019, I electronically filed the foregoing motion with the Clerk of the Court using the CM/ECF system which will send notification of this filing to all parties registered to receive such notice.

s/ Steve I. Silverman

Steve I. Silverman

[ssilverman@klugerkaplan.com](mailto:ssilverman@klugerkaplan.com)